Supreme Court, U. S.
FILED
MAY 18 1978
MICHAEL RODAK, JR., CLERK

No. 77-1522

In the Supreme Court of the United States

OCTOBER TERM, 1977

RAMSEY ALEXANDER, et al.,

Petitioners,

vs.

AERO LODGE NO. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AERO SPACE WORKERS, AFL-CIO, and AVCO CORPORATION, AEROSPACE STRUCTURES DIVISION.

Respondents.

BRIEF FOR RESPONDENT AVCO CORPORATION IN OPPOSITION

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OPINIONS BELOW

Respondent Avco accepts Petitioners' statement of the opinions below.

JURISDICTION

Respondent Avco accepts Petitioners' statement of jurisdiction.

QUESTION PRESENTED

Did Respondent Avco violate Title VII of the Civil Rights Act of 1964 when it retrained and recalled a group of recently laid-off and more senior employees to aircraft assembly work, because the incumbent aircraft employees enjoyed less seniority but were more racially balanced in their composition than the recalled group?

STATUTORY PROVISIONS INVOLVED

Respondent Avco accepts Petitioners' statement of the statutory provisions involved.

STATEMENT OF THE CASE

Petitioners filed their complaints in these consolidated class actions on January 13, 1966 and December 20, 1968, respectively, alleging racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* Respondent Avco denied any violation of Title VII, as well as all allegations of the complaints other than formal averments.

At the trial, toward the conclusion of Petitioners' case in chief, they called an Avco official as a witness, and among other things questioned him as to compliance with commitments under Avco's Affirmative Action Program, with specific emphasis on the training of black employees for aircraft assembly work and other jobs. In his testimony, the official mentioned the training for aircraft assembly work of a group of long-service employees, all of whom were white, who had worked for Avco in a furniture manufacturing project conducted under a contract with the Globe-Wernicke Company. These employees had been laid off after performance of the contract was completed. They received no wages or other compensation during

their training, but were thereafter recalled by Avco for aircraft assembly work. At the time, the alternative would have been to hire and then train new, inexperienced employees "off the street". Several months later, a reduction in force took place in aircraft assembly operations, and because of their seniority rights, these former Globe-Wernicke employees retained their aircraft jobs longer than a group of other employees, some of whom were black, who had worked longer in aircraft assembly but did not have equivalent plant-wide seniority.

The Globe-Wernicke employees were trained in two schools, the first of which included 73 individuals and the second 19, for a total of 92 persons. The subsequent aircraft force reduction resulted in the layoff between March 3, 1972 and April 14, 1972 of 124 aircraft assembly workers. 72 of whom were white and 52 of whom were black. Obviously, the layoff of the entire group of 124 employees during that period cannot be attributed to the training of the 92 white Globe-Wernicke employees. Moreover, all of the 52 black employees laid off from the aircraft assembly operation would in any case have been laid off within the next two or three weeks, even if the Globe-Wernicke contingent had been laid off first, as is demonstrated in Avco's Report to the Court, filed in the District Court on September 16, 1974.

The training of the Globe-Wernicke employees in aircraft assembly work was conducted at the request of the Respondent Union, the representatives of which insisted that such a course of action was consistent with the general recall clause of the collective bargaining agreement and was in accord with past precedent. The precedent relied upon by the Union occurred in 1964, when a project for the Philco Company was completed and the laid-off Philco employees were recalled for other jobs after requisite training.

The Court of Appeals concluded as a matter of law that the collective bargaining agreement neither prohibited nor required the training and subsequent recall of the laid off Globe-Wernicke employees, and that under the agreement, "Avco was free to go into the open labor market to recruit new workers and to train them for service in the assembler-bench and jig occupation." 565 F. 2d at p. 1380. The opinion observes that while the training and recall of the Globe-Wernicke employees was not demanded by the collective bargaining contract, this proposition "is a far cry from holding, as did the trial judge, that the practice violated . . . [the contract]. It simply did not."[1] Instead, the majority conceived "the real issue to be whether Avco had a duty to refrain from retraining and hiring recently laid-off and more senior employees in order to protect the interests of newer employees, who enjoyed less seniority but were more racially balanced in their composition."[2]

Under the collective bargaining agreement between Avco and the Union in effect at the time of the Globe-Wernicke incident, seniority was defined solely on a plant-wide basis. Bumping privileges were accorded to employees affected by a reduction in force, limited in essence only by a requirement of capability for the relevant work derived through prior service in the occupation in which bumping on the basis of seniority was desired. Promotional opportunities were afforded to employees in accordance with a procedure of advanced bidding, which permitted an employee to compete for any job in the plant for which he was qualified, irrespective of his particular

[1] 565 F. 2d at p. 1381.

[2] *Ibid.*

departmental assignment. By filing a "job preference" card, a candidate for promotion could obtain placement, if qualified for the duties involved, on a job preference list, and thus would become eligible for automatic promotion in accordance with plant-wide seniority when an opening occurred. Openings not filled by advance bids were to be posted on bulletin boards for the employees' examination. Six simultaneous advance job bids could be filed by any employee.

The Court of Appeals held below that this seniority system was immunized by Section 703(h) of the Act.[3] Petitioners have not sought review by this Court of the holding of the Court of Appeals that the seniority system maintained by Avco and the Union was a bona fide system within the meaning of Section 703(h).

[3] The opinion observes: "Like the Supreme Court in *Teamsters*, we are totally unable to find that the system under attack in the instant case was established or maintained with an intent to discriminate. Like that in *Teamsters*, it applies equally to all races and ethnic groups. To the extent that it '"locks" employees into . . . jobs, it does so for all.'" 565 F. 2d at p. 1378.

ARGUMENT

1. The Globe-Wernicke issue was an extraneous, non-determinative question. As stated by the Court of Appeals, the incident was not mentioned in the Plaintiffs' complaints and only became an issue midway through the trial on the merits. Furthermore, as stated by the Court of Appeals, no injunctive relief was specifically directed at remedying its effects. 565 F. 2d at p. 1379.

Not only did the original pleadings not address this issue, but there was no amendment to the pleadings that did so, either by pretrial order or otherwise. It is true that the incident, as stated by the Court of Appeals, "loomed large in the [District] court's considerations of the case". However, the Court of Appeals declined to agree with the contention of Avco that the District Court's reaction to the incident "totally destroyed the reliability and impartiality of his other findings". 565 F. 2d at p. 1380. Indeed, the Court of Appeals affirmed the District Court on two out of three of its decisions as to racial discrimination against plaintiffs or intervening plaintiffs, and affirmed its award of back pay to them in spite of the fact that in both cases arbitrators had ruled in favor of Avco.

Rule 19 suggests that only "decisions" may be reviewed by certiorari. Neither the District Court nor the Court of Appeals made a "decision", in the normal sense of the word, regarding the Globe-Wernicke incident. The District Judge regarded it as racially discriminatory, and the Court of Appeals disagreed with his finding. But a finding is not a decision. Perhaps the reason there was no amendment to the complaints relating to this incident,

after the District Judge indicated his view of it, was that the black employees said to have been discriminated against would have been laid off anyway within a matter of days. While there was no evidence to this effect in the record before the Court of Appeals, the figures were introduced later into the record in the District Court. These figures demonstrate the error in the District Judge's view that the cut-back resulted in "retaining the old Globe-Wernicke employees" (33a) while the jobs of black employes were "terminated" (34a).

2. There is no conflict between the decision of the Court of Appeals in this case and the decisions of this Court in *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 97 S. Ct. 1843 (1977), *United Airlines* v. *Evans,* 431 U.S. 553, 97 S. Ct. 1885 (1977), and *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 96 S. Ct. 1251 (1976). On the contrary, the decision of the Court of Appeals not only is compatible with, but is constrained by the rationale of those precedents. *Teamsters* holds that ". . . an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." 431 U.S. at p. 353, 97 S. Ct. at p. 1864. "*Evans* holds that the operation of a seniority system is not unlawful under Title VII even though it perpetuates post-Act discrimination that has not been the subject of a timely charge by the discriminatee."[4] *Teamsters* and *Evans* expand upon

[4] This is how the Court in *Teamsters* actually believed it was ruling in *Evans,* according to footnote 30 of the opinion in *Teamsters.* 431 U.S. at p. 348, 97 S.Ct. at p. 1861. Footnote 30 goes on to conclude, "Section 703(h) on its face immunizes all bona fide seniority systems, and does not distinguish between the perpetuation of pre- and post- Act discrimination."

this Court's initial holding in *Franks* "that §703(h) does not bar the award of retroactive seniority to job applicants who seek relief from an employer's post-Act hiring discrimination."[5]

The Court of Appeals held below as a matter of law that the seniority system embodied in the collective bargaining agreement between Avco and the Union was a bona fide seniority system within the meaning of §703(h) of the Act. The Court of Appeals said:

> "A preference to those with experience in a given occupation is in a sense limited occupational seniority and we see nothing in the statute or in *Teamsters* to indicate that it should stand on a different footing than traditional plant-wide or departmental seniority. It is a contractual provision neutral on its face and is, in our view, an integral part of Avco's unique but nonetheless bona fide seniority system." 565 F. 2d at pp. 1378-1379.

Petitioners do not challenge the quoted conclusion of the Court of Appeals, and it therefore must be taken as correct, which we assert it clearly was.

Petitioners do not contend—and the District Judge did not find—that Avco had discriminated against blacks by excluding them from training for aircraft assembly jobs.[6]

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[5] This is how the Court characterized *Franks* in the *Teamsters* opinion. 431 U.S. at p. 346, 97 S. Ct. at p. 1860.

[6] The record shows that in 1965 Avco began an intensive effort to hire and train black persons in aircraft assembly skills, in which most of its openings occurred, and in that year 16% to 17% of the persons hired were black. Thereafter, the target black enrollment in each training class under MDTA and JOBS programs was 50% —a proportion which was actually *exceeded* in 1969 and 1970. Defendant's Exhibit Q (page 2), shows an overall black enrollment in the first seven aircraft training classes of 63.07%.

It follows that the training of the laid-off Globe-Wernicke employees in aircraft assembly skills cannot be viewed as racially discriminatory *per se*. What the District Judge decided—and what Petitioners now urge—is that the training of the Globe-Wernicke employees should be considered to be racially discriminatory because of the fact that Avco's seniority system automatically honored the plant-wide seniority dates of the Globe-Wernicke employees. This happened when they were recalled to work in aircraft jobs, where they took precedence over less senior employees, some black but more of whom were white, with more aircraft service but less plant-wide seniority. The simple and incontrovertible answer to this contention is that such a so-called "impact" constitutes nothing more than "the routine application of a bona fide seniority system", and is immunized from attack by §703(h) of the Act under the doctrine of *Teamsters, supra,* 431 U.S. at p. 352, 97 S. Ct. at p. 1863.

Petitioners' statement of the question presented recites that the employer provided a "special training program for an all-white group of employees", for the purpose of discriminating on the basis of race against black employees. This is an incorrect and misleading statement. The Globe-Wernicke training program was not "special" in the sense that it was offered only to these employees. Practically all the employees in the aircraft assembler-bench and jig occupation had been given similar training, including the black employees who were the subject of the subsequent layoff. The reason was stated by Frank T. Foster, supervisor of employment, who was called as a witness by Petitioners:

> "Well, in 1965 we set upon a big hiring program for the training of people for aircraft work because Nashville just doesn't have trained aircraft mechan-

ics or trained aircraft people. We hired both blacks and whites and put them in these schools we run every so often. I think the ratio of that was about between 16, maybe 17 percent blacks who were hired to train for that, those particular schools during the year 1965." (R. 605).

Not only were black employees hired and put in these schools, but black employees in lower-paid jobs were also given the opportunity to transfer to assembler-bench and jig jobs after being trained (R. 268-269, 293, 667). Moreover, prior to the so-called Globe-Wernicke incident, a group of employees laid off from the Philco operation had been similarly trained (R. 1044-1051).

Thus, it appears that the particular training program in which these Globe-Wernicke white employees were trained was nothing new and certainly was not purposefully discriminatory. The fact that this particular group was "all-white" was pure happenstance.

It is incorrect to say, as do Petitioners, that the white Globe-Wernicke employees were inferior "in seniority" to the 52 black aircraft workers who were subsequently excessed—along with 72 whites—when the aircraft force was reduced. Both the Globe-Wernicke employees and the laid-off black employees possessed at all times seniority computed from their original dates of hire under the collective bargaining agreement, as the Court of Appeals opinion demonstrates. 565 F. 2d at p. 1379. It is only by reason of the lack of prior aircraft qualifications and experience on the part of the white Globe-Wernicke employees that they had not previously been placed in aircraft jobs. Clearly, to impart aircraft skills to the Globe-Wernicke employees in a training school was neither the recognition of additional seniority nor the restoration of lost seniority, and the recall of the Globe-Wernicke employees upon the completion of training was in no sense

a "revision" of the seniority system. Their seniority remained constant at all times.

At the time the laid off Globe-Wernicke employees were trained for aircraft assembler-bench and jig work, Avco had already assigned to this work all available employees, including laid-off employees, who had sufficient training (R. 669-670). Since these laid-off Globe-Wernicke employees desired to be trained for aircraft work, Avco's only alternatives, other than the one it chose, would have been to: (i) take the position that they were not eligible for training because they were laid-off employees with plant-wide seniority; or (ii) refuse to train them and give them the available jobs except on condition that they give up their seniority. If Avco had pursued either of these courses, it would have subjected itself not only to a charge of reverse discrimination but also to a charge of commission of an unfair labor practice, for the reason that the asserted seniority rights of the Globe-Wernicke employees under the collective bargaining agreement were "but an extension of the concerted activities that gave rise to that agreement". *A.S. Hubbs,* 163 NLRB 292, 296 (1967). The Court of Appeals pretermitted this point, which was fully presented at pages 28-37 of Avco's main brief in the Court of Appeals.

3. There is no conflict between the decision of the Court of Appeals in this case and the decision of the Seventh Circuit in *Waters* v. *Wisconsin Steel Works,* 502 F. 2d 1309 (7th Cir. 1974), *cert. denied,* 425 U.S. 997 (1976). In this case the Court of Appeals expressly relied upon *Waters* in holding that Avco's "retraining and rehiring" of the laid-off Globe-Wernicke employees did not violate Title VII, quoting with approval from the *Waters* opinion, as follows (565 F. 2d at p. 1381):

> "We do not doubt that a policy favoring recall of a former employee with experience, even though white,

before considering a new black applicant without experience comports with the requirements of Title VII . . . To that end, we do not perceive any discriminatory impact with respect to Samuels who was a new applicant. 502 F. 2d at 1320."

It may be true that in *Waters* the Seventh Circuit also held that Title VII had been violated when the employer restored the seniority rights of white employees who had waived their seniority in return for severance pay, thereby placing them ahead of Waters (a black bricklayer who had temporarily worked for the employer) on the seniority escalator for recall purposes. But this is hardly analogous to the treatment of the Globe-Wernicke employees at bar, who had neither waived nor lost their seniority following completion of the Globe-Wernicke project. In no sense did Avco accord "special seniority benefits" to the Globe-Wernicke employees, who stood at exactly the same place on the seniority escalator both before and after their training. As already emphasized, the later exercise of their seniority by the Globe-Wernicke employees in retaining their jobs on an interim basis ahead of less senior black aircraft workers was a protected application of Avco's bona fide seniority system. In any case, there was no real adverse impact visited upon the less senior black aircraft workers at the time of the force reduction, because all 52 of these black aircraft workers were subject to lay off within the next two or three weeks even if the Globe-Wernicke employees had never been trained and recalled.[7]

4. The suggestion that the Court of Appeals below departed from its proper fact-finding role, as prescribed in *Hazelwood School District* v. *United States*, 433 U.S. 299, 97 S. Ct. 2736 (1977), wholly misconceives the meaning of that decision. *Hazelwood* was brought to this Court

[7] This is reflected in Avco's Report to the Court, filed in the District Court on September 16, 1974.

in the context of a District Court decision which had erroneously "focused on a comparison between the percentage of Negro teachers and Negro pupils in Hazelwood", with the result that it made no "evaluation of the relevant labor market". Footnote 20, 433 U.S. at p. 313, 97 S. Ct. at p. 2744. This Court's decision in *Hazelwood* announces the rule that the trial court must make the fundamental findings of fact which will support, in the first instance, the identification of the relevant labor market area for comparing hiring figures. That is all it stands for. Here, there was no attempt by the Court of Appeals to usurp the function of the District Court in making initial findings of fact necessary to any of the determinations of the lawfulness of the actions of Avco or the Union in the Globe-Wernicke incident. Indeed, as Petitioners themselves concede, the Court of Appeals below accepted in substance the District Court's findings of fact regarding the training and recall of the Globe-Wernicke employees. That the Court of Appeals viewed those findings of fact as insubstantial support for the District Court's ultimate determinations of law is no departure from the appellate role as bounded in *Hazelwood*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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